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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

BRIEF OF APPELLANTS.

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OCTOBER TERM, 1975.

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No. 75-1150.

—

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC, AND DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

BRIEF OF APPELLANTS.

—

OPINIONS BELOW.

The opinion of the Superior Court of New Jersey, Law Division, declaring *P. L.* 1973, *c.* 363 (*N. J. S. A.* 13:1I-9, 10) unconstitutional is not reported. The opinion of the Superior Court of New Jersey, Chancery Division, in the

companion case *Hackensack Meadowlands v. Mun. Landfill Auth.* is reported in the official reports at 127 *N. J. Super.* 160 (Ch. 1974), and in the unofficial reports at 316 *A.* 2d 711. The opinion of the New Jersey Supreme Court, reversing the trial court's decisions in each of the aforesaid cases, is published in the official reports as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975), and in the unofficial reports as *Hackensack Mead. Dev. Com'n v. Municipal L. A.*, 348 *A.* 2d 505 (N. J. Sup. Ct. 1975). Said opinion is cited as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975) in the within Brief.

JURISDICTION.

This matter is brought pursuant to 28 *U. S. C.* § 1257(2) and in the alternative, 28 *U. S. C.* § 1257(3) to set aside the judgment of the New Jersey Supreme Court which upheld the constitutionality of *P. L.* 1973, *c.* 363. Said judgment was rendered on November 18, 1975, and entered on the same date. Thereafter, on December 11, 1975, the New Jersey Supreme Court remanded the matter to the Superior Court, Law Division, "for such further proceedings, if any, that that Court may deem appropriate . . ." (A340). On December 19, 1975, the New Jersey Superior Court, Law Division, issued its order stating, in pertinent part, that ". . . no further proceedings are deemed appropriate by this Court . . ." (A343). A notice of appeal to the Supreme Court of the United States was thereafter filed in the New Jersey Supreme Court on January 9, 1976. The jurisdiction of the Supreme Court of the United States to review this suit (a) by direct appeal is conferred by Title 28, *United States Code*, Section 1257(2), and alternatively (b) by certiorari is conferred by Title 28, *United States Code*, Section 1257(3).

STATUTE INVOLVED.

The text of *P. L.* 1973, *c.* 363, the constitutional validity of which is involved in the present suit, reads as follows:

> "The legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.
>
> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the 'Waste Control Act,' P. L. 1973, c. 39."

Said statute is published in the pocket part of Title 13, *New Jersey Statutes Annotated, Section* 1I-9 and 1I-10 at pp. 85-86.

QUESTIONS PRESENTED.

1. Is solid and liquid waste, or the process of collecting, transporting, treating and disposing of same, a recognized subject of interstate commerce?

2. Does a state statute which prohibits the entry into the state of any solid or liquid waste (except garbage to be fed to swine in the state) collected in another state, discriminate against or place an undue burden upon interstate commerce?

3. In reversing an order granting a motion for summary judgment, may an appellate court constitutionally decide the case on its merits without offering the moving parties an opportunity to be heard, prior to the final determination, on the material issues of fact raised by their complaint?

STATEMENT OF THE CASE.

On January 2, 1974, *P. L.* 1973, *c.* 363, being

> "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State . . . ,"

was approved by the Governor of the State of New Jersey, to become effective on February 1, 1974.

On January 21, 1974, appellants filed a complaint attacking the constitutionality of said statute on federal and state constitutional grounds (A7). Their simultaneous application for a temporary restraining order was supported by an affidavit of a licensed professional engineer (A37) which averred that the transportation, treatment or disposal of solid waste in New Jersey in accordance with applicable Federal and New Jersey state and administrative laws, rules and regulations would not pose a threat to the health, welfare and safety of the residents of said state:

• • •

> "3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.
>
> "4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat

> to the health, welfare or safety of the residents of the State of New Jersey." [1]
>
> • • •

It was further supported by a copy of a letter dated December 26, 1973 from Richard W. DeKorte, Esq., Counsel to Governor William T. Cahill, to David Quient, Esq., city attorney of appellant City of Glen Cove (A47), in which the Counsel to the Governor stated:

> "Also, I might add that Senate Bill No. 2367 (OCR) [*P. L.* 1973, *c.* 363] would not have been introduced had the sister states of New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination."

Based upon the aforesaid documents, and additional affidavits which documented that immediate and irreparable harm would be suffered by appellants if temporary injunctive relief was not granted, the Superior Court of New Jersey, Law Division issued an Order to Show Cause with Temporary Restraints on January 21, 1974, which, *inter alia*, restrained the State from enforcing the provisions of *P. L.* 1973, *c.* 363 (A5). On the return date of the Order to Show Cause, February 1, 1974, the trial court issued an interlocutory injunction continuing the restraints theretofore issued, and further specifically enjoining the enforcement of *N. J. A. C.* 7:1-4, until its further order [2] (A105).

1. The conclusions expressed in said paragraphs 3 and 4 have never been attacked or rebutted. Quite the contrary, they have been confirmed by appellees. See p. 9 *infra*.

2. *N. J. A. C.* 7:1-4, a rule governing the importation of solid and liquid waste from outside New Jersey, was adopted by the Commissioner of the New Jersey Department of Environmental Protection on January 18, 1974, pursuant to authority conferred by *P. L.* 1973, *c.* 363. Said rule, which was adopted as an emergency measure to become effective February 1, 1974, provides, in pertinent part, as follows:

N. J. A. C. 7:1-4.2

"(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

(1) Garbage to be fed to swine in the State of New Jersey;

(2) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

(3) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thruput of any such facility is to be separated or processed into usable secondary materials; and

(4) Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State."

A verbatim copy of the entire rule as same was adopted by the Commissioner appears at A92.

In granting interlocutory injunctive relief, the trial court considered among others, an affidavit of the Deputy Assistant Administrator for Solid Waste Management Programs, United States Environmental Protection Agency (A55), which averred, in pertinent part, as follows:

> • • •
>
> "It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no

immediate health threat to justify the precipitous passage and implementation of this statute [*P. L.* 1973, *c.* 363] and these regulations. [*N. J. A. C.* 7:1-4]

• • •

. . . a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act. . . . Moreover, the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.

• • •

The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning. We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.

• • •

. . . A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.

In conclusion, it is EPA policy that no municipality or State should take action to prevent the free flow of waste across municipal or state boundaries provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and

state environmental and land use laws, guidelines, regulations, and recognized engineering practices."

A plenary hearing on the merits of appellants' complaint was scheduled by the Court for March 25, 1974 (A118).

On February 11, 1974, John P. Fazzio, Inc., t/a John P. Fazzio Landfill Co. and Continental Vanguard, Inc. were granted leave to intervene.

Thereafter on February 13, 1974, appellees filed their answer to the complaint in this matter, wherein they specifically admitted that the principal concern of the New Jersey Legislature in adopting *P. L.* 1973, *c.* 363 was to preserve landfill acres in New Jersey for solid waste generated in said State. They further admitted that there is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State, and there is no difference with respect to the disposal of same (A97).

On March 13, 1974, appellants deposed the Principal Environmental Engineer of the Bureau of Solid Waste Management, New Jersey Department of Environmental Protection. During the course of said deposition, the engineer admitted that the proposed Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* (effective July 1, 1974) (A107, 109), were entirely adequate to protect the health, safety and welfare of the people of the State of New Jersey and the quality of its environment.[3] He also revealed that no effort had been

3. Said rules were designed to prohibit dumps and to comprehensively regulate solid and liquid waste disposal facilities. Particular attention was directed toward controlling problems which had regularly been associated with dumps, including (a) dust, (b) odor, (c) fire, (d) insects, (e) rodents, (f) scattering of papers and other lightweight materials, (g) gas generation, (h) surface and

made by the Department of Environmental Protection to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey or to identify the location and availability of facilities which presently exist or may hereafter be developed outside the State of New Jersey (A115).

Appellants thereafter moved for summary judgment on two federal constitutional grounds which, in their opinion, raised solely questions of law: (a) *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States, and (b) the Congress of the United States has preempted the narrow field preventing the adoption of laws, ordinances and regulations which prohibit the interstate movement of solid waste for purposes of treatment or disposal (A116).[4] Appellees cross-moved for summary judgment on the same issues, and urged in a portion of their brief filed with the trial court (A121-122), that summary judgment not be granted to appellants pending a hearing on the merits:

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints.*
>
> • • •
>
> "Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

3. (Cont'd.)
ground water quality, (i) collection and haulage, (j) open burning, and other related problems.

4. The motion did not seek summary judgment with respect to the many remaining federal constitutional questions raised by the complaint since those questions involved genuine issues of material fact (A7 *et seq.*, 120).

Pending a determination of the motions, the hearing date was rescheduled to April 15, 1974, if necessary.

On March 25, 1974, the trial court heard oral argument on the cross-motions for summary judgment, and delivered its opinion (A206) granting summary judgment to appellants and striking down *P. L.* 1973, *c.* 363 on the ground that same discriminated against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States:

> ". . . I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional."

On April 23, 1974, appellees filed a notice of appeal (A216), by which they appealed from the trial court's grant of summary judgment to appellants.

More than 4 months later, on July 26, 1974, appellees moved before the Superior Court of New Jersey, Appellate Division, for a stay of judgment (A218). Said motion was denied by the Court on August 14, 1974 (A220).

Following the submission of briefs by all parties, and prior to argument in the Appellate Division, the appeal was certified directly to the New Jersey Supreme Court and consolidated with *Hackensack Meadowlands v. Mun. Landfill Auth.*[5] by order dated October 7, 1974 (A223). The consolidated cases were argued before the New Jersey Supreme Court on December 2, 1974.

Almost one year later, on November 18, 1975, the New Jersey Supreme Court reversed the judgment of the trial court on the merits, and vacated the injunctive order which had been in effect since the inception of the litigation. Although the Court agreed that certain solid and liquid waste is merchantable and that the transportation and disposal of solid and liquid waste represents a legitimate subject of interstate commerce, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra* at 466-469, it nevertheless upheld the constitutionality of *P. L.* 1973, *c.* 363 on the grounds that same represented a reasonable exercise of the State's police power and did not place an undue burden upon or discriminate against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States. It also concluded that Congress did not preempt the field of solid waste disposal (A225).

By its ruling, the New Jersey Supreme Court adopted a novel and unprecedented procedural approach: it disposed, on its merits, of a case involving substantial disputed issues of material fact which had never been heard

5. In *Hackensack Meadowlands,* suit was brought by the Hackensack Meadowlands Development Commission and the Department of Environmental Protection to enjoin the Municipal Sanitary Landfill Authority from accepting for disposal in its landfill site located within the Hackensack Meadowlands District any solid waste originating from or collected outside the territorial limits of New Jersey. The Superior Court, Chancery Division, held that the exclusion of out-of-state solid waste from deposit in landfill sites within the state was unconstitutional as representing a discrimination against interstate commerce.

by the trial court.[6] Since a hearing was not held, there was no testimony from which to make findings of fact with respect to either (a) the legitimacy of the exercise of the State's police power and the nature and degree of the burden imposed upon interstate commerce, or (b) the numerous issues of material fact raised by the remaining counts contained in appellants complaint. Curiously, such remaining counts were never mentioned by the New Jersey Supreme Court in its opinion.

On November 18, 1975, the same date upon which the case was decided, the New Jersey Supreme Court granted appellants emergent motion for a stay of judgment and interim injunctive relief pending its further order (A257).

In an effort to abate the extreme prejudice visited upon them, appellants moved the New Jersey Supreme Court to retain jurisdiction pending a remand of the factual issues to the trial court on an expedited basis (A259). The trial court reported that it could hold a plenary hearing within two weeks. In the alternative, appellants sought a stay pending an application for injunctive relief to the Supreme Court of the United States.

On December 11, 1975, the New Jersey Supreme Court denied appellants' motion for a stay, vacated the

6. The trial court granted, as a matter of law, appellants' motion for summary judgment prior to the scheduled hearing date. The only facts presented to the trial court were contained in affidavits in favor of and in opposition to the issuance of interim injunctive relief, and these affidavits, with one exception (A70), were not part of the appendix presented to the New Jersey Supreme Court at the time it decided the case. There was no reason to present said affidavits to the New Jersey Supreme Court since their purpose was solely to support an application for interim injunctive relief and *not* to prove a case involving disputed issues of material fact. Based upon the Rules of Court, appellants understood that the case would be remanded for a hearing on the merits if an appellate court reversed the order of the trial court granting summary judgment.

emergency stay that it had previously issued, effective December 31, 1975, and further

> "ORDERED that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further
>
> ORDERED that this Court does not retain jurisdiction."
>
> (A340).

Based upon this order, appellants and intervenors were compelled, as a practical matter, to dismiss with prejudice every count in their respective complaints which had not been specifically resolved by the New Jersey Supreme Court in its decision of November 18, 1975, so that there would unquestionably be a final judgment from which a direct appeal could be taken to the Supreme Court of the United States. In the order pursuant to which the unresolved issues raised by appellants and intervenors complaints were dismissed (A342), the trial court

> "FURTHER ORDERED, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of P. L. 1973, c. 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter."

On December 22, 1975, appellants filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on December 31, 1975. Thereafter, probable jurisdiction was noted on April 5, 1976.

SUMMARY OF ARGUMENT.

Solid and liquid waste, and the service of collecting, transporting, treating and disposing of same, are recognized subjects of interstate commerce.

A statute which prohibits the entry of a subject of commerce, irrespective of condition or potential for harm, is directed against commerce and may not stand.

If a threat is caused to the public health and environmental quality by solid and liquid waste, or the process of treating, transporting and disposing of same, it is based upon the nature of the substance being regulated and not its place of origin. Regulation of such commerce must be accomplished in an evenhanded, nondiscriminatory manner.

The Court will decide for itself whether a statute represents a legitimate exercise of the state's police power, or whether it really amounts to a discriminatory regulation of interstate commerce and a direct burden thereon.

A police regulation which affects interstate commerce must not go beyond the necessities of the particular case. If the legislative purpose is to preserve acreage from use as a disposal site, there is no reason to prohibit entry or forms of treatment and disposal other than sanitary landfilling.

In light of the many genuine issues of material fact, the New Jersey Supreme Court erred in upholding the constitutionality of *P. L.* 1973 *c.* 363 as not violative of the Commerce Clause absent a hearing, on the merits, before the trial court. Appellants were thereby denied due process of the law.

ARGUMENT.

A.

Solid and Liquid Waste, and the Process of Collecting, Transporting, Treating and Disposing of Same, is a Recognized Subject of Interstate Commerce.

In the proceedings before the New Jersey Courts, Appellees argued that solid and liquid waste are not legitimate subjects of interstate commerce, and therefore not within the purview of the commerce clause. This contention was rejected below, and is wholly unsupportable in law and in fact.

The meaning of the clause "legitimate subject of commerce" was explained by Mr. Justice Matthews in *Bowman v. Chicago &c Railway Co.*, 125 *U. S.* 465 (1888). Holding that a state cannot, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate interstate commerce, the court stated:

> "*. . . It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse.*
>
> • • •
>
> . . . Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their

condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life.

Bowman v. Chicago &c Railway Co., 125 *U. S. supra*, at 488-489. (Emphasis added.)

Pursuant to the decision in *Bowman*, if solid or liquid waste or some identifiable portion thereof is a "known article of commerce", or if the service of collecting and disposing of solid or liquid waste is a "subject of trade or commerce", then a prohibition against importation cannot be imposed merely on account of intrinsic nature, without regard to condition and quality.

Subjects of interstate commerce are determined by ". . . practical consideration and the established course of business". *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S.* 110 (1928), *Shafer v. Farmers Grain Co.*, 268 *U. S.* 189, 198 (1925), *Public Utilities Comm. v. Landon*, 249 *U. S.* 236, 245 (1919); cf. *Rearick v. Pennsylvania*, 203 *U. S.* 507, 523 (1906). Commerce is not confined to transportation alone, but comprehends all commercial intercourse, including the component parts thereof.[7]

7. Commerce, in the Constitutional sense, contemplates every kind of intercourse, including the transmission of electric current, *FPC v. Florida Power & Light Co.*, 404 *U. S.* 453, 458 (1972), and radio waves, *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 *U. S.* 266, 279 (1933), pastured cattle meandering across a state line, *Thornton v. United States*, 271 *U. S.* 414 (1926), the interstate movement of petroleum, *Pipe Line Cases*, 234 *U. S.* 548, 560 (1914), telegraphic communications by wire, *Telegraph Co. v. Texas*, 105 *U. S.* 460, 464 (1882) and pollutants in ambient air, *United States v. Bishop Processing Co.*, 287 F. Supp. 624, 629 (D. Md. 1968). With respect to pollutants in ambient air and water, see also *Illinois v. Milwaukee*, 406 *U. S.* 91, 103 (1972).

Dahnke-Walker Co. v. Bondurant, 257 *U. S.* 282, 290 (1921).

Appellants' solid waste collection and disposal companies are lawful business entities existing under the laws of the State of New Jersey (A7), *N. J. S. A.* 14A:1-1 *et seq.*, and generally empowered by same

> "to conduct its business, carry on its operations, and have offices and exercise the powers granted by this act anywhere in the universe".
>
> *N. J. S. A.* 14A:3-1(1)(i)

Appellees admit that solid waste collected outside New Jersey has been disposed of at sanitary facilities within the State [8] (A83, 97), and that certain communities in New Jersey dispose of all or a portion of their solid waste outside the State of New Jersey (A114). Such practice has been carried on for years. *United States v. Pennsylvania Refuse Removal Ass'n.*, 242 *F. Supp.* 794 (E. D. Pa. 1965).

The legislature has recently acknowledged the solid waste industry as an integral part of "the free enterprise system" in New Jersey. *P. L.* 1975, *c.* 326, *N. J. S. A.* 13:1E-2b(5). It has also specifically recognized the need to assure an adequate volume of solid waste at solid waste facilities: [9]

> "The Legislature recognizes that solid waste and recycling facilities will be financed through long term borrowing which requires the negotiation of long term contracts with municipalities

8. According to Departmental estimates, 1.5 million tons of solid waste originating outside of the State was disposed of in New Jersey in 1971 (A83-84).

9. The term "solid waste facilities" is defined in the Act to ". . . mean and include . . . incinerators . . . [and] sanitary landfill facilities or other plants for the disposal of solid waste . . . in a sanitary manner". *P. L.* 1925, *c.* 326, *N. J. S. A.* 13:1E-3h.

and other solid waste collectors *to guarantee the flow of solid waste to such facilities.*"

P. L. 1975, *c.* 326, *N. J. S. A.* 13:1E-2c. (Emphasis added.)

Appellant City of Philadelphia has entered into long term contracts with sanitary landfill facilities located in New Jersey (A31, 41, 271). Expenditures for environmental controls approximating $500,000 were made at Appellant Kinsley's Landfill, Inc. sanitary landfill site upon the direction of the Department of Environmental Protection (A270). The improvements would not have been made but for a ten year contract with Philadelphia (A271). A sanitary landfill must receive a sufficient quantity of solid waste to be economically feasible (A271, 281-282). If prevented from obtaining solid waste, the business of Kinsley's and of other Appellant sanitary landfill owners will be greatly diminished or destroyed (A44, 254, 271, 281). *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S. supra*, at 8.

The proposition that the disposal in one state of solid waste collected in another state constitutes an activity in interstate commerce is too well established to be seriously questioned. In *United States v. Pennsylvania Refuse Removal Assn.*, 242 *F. Supp.* 794 (E. D. Pa. 1965) certain defendants were indicted and convicted for price fixing, allocating customers and rigging bids in connection with a refuse removal business in the Greater Philadelphia area in violation of the Sherman Anti-Trust Act. That Act provides, in pertinent part, "Every . . . conspiracy, in restraint of trade or commerce among the several states, . . . is declared to be illegal". 15 *U. S. C.* § 1.

The Court held that the disposal in New Jersey of substantial quantities of refuse collected in Pennsylvania constituted an activity within the flow of interstate commerce. In responding to defendants' arguments that a

worthless commodity like trash cannot be the subject of "trade or commerce" as those terms are used in the Sherman Act, the Court observed:

> "That argument misses the point. Here, the real subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since *services are encompassed within the meaning of the words 'trade or commerce' as used in the Act*, United States v. Nat'l Assn. of Real Estate Boards, 339 U. S. 485, 488-492, 70 S. Ct. 711, 94 L. Ed. 1007 (1950), the defendants position has no merit."
>
> *United States v. Pennsylvania Refuse Ass'n.*, 242 *F. Supp., supra*, at 700. (Emphasis added.)

The decision of the Federal District Court was affirmed by the Court of Appeals for the Third Circuit which succinctly stated: ". . . refuse transported from Pennsylvania to New Jersey and disposed of in the latter state . . . was plainly a proper subject of interstate commerce". *United States v. Pennsylvania Refuse Removal Ass'n.*, 357 *F.* 2d 806, 808 (3rd Cir. 1966). Certiorari was denied by this Court, 384 *U. S.* 961 (1966).[10]

Established business practice leads inescapably to the conclusion that the collection and disposal of solid waste is a long-accepted activity in interstate commerce. But that is not all. The New Jersey Legislature has implicitly

10. Congress exercised its full power over interstate commerce in the Sherman Act, *U. S. v. Frankfort Distilleries*, 324 *U. S.* 293, 298 (1945), *U. S. v. Underwriters Ass'n.*, 322 *U. S.* 533, 558 (1944), *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 *F.* 2d 732, 739 (9th Cir. 1954). Therefore, if solid waste collection and disposal services in the flow of interstate commerce are viewed as trade or commerce for purposes of the Sherman Act, they also must constitute commerce within the meaning of the commerce clause, *U. S. Const.* Art. 1, Sec. 8, cl. 3.

recognized solid waste collection and disposal as a legitimate subject of commerce. In adopting the Solid Waste Utility Control Act of 1970, *N. J. S. A.* 48:13A-1 *et seq.*, the Legislature found that the *service* of solid waste collection and disposal ". . . is a matter of grave concern to all citizens and is an activity thoroughly affected with the public interest, . . ." *N. J. S. A.* 48:13A-2, and that the ". . . rates and public utility aspects of the solid waste collection industry and the solid waste disposal industry . . ." should be regulated by the Board of Public Utility Commissioners, *N. J. S. A.* 48:13A-4. The entire solid waste industry was afforded public utility status by *N. J. S. A.* 48:2-13, which states, in pertinent part:

> "The term 'public utility' shall include every . . . solid waste collection, [or] solid waste disposal . . . system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State . . . ."

In *Wolff Co. v. Industrial Court.*, 262 *U. S.* 522, 535 (1923), Mr. Chief Justice Taft observed that a public utility has ". . . the affirmative duty of rendering a public service demanded by any member of the public". Termination or discontinuance of such service can be effected only with the express approval of the Public Utilities Commission, *N. J. S. A.* 48:2-24. One is hard-pressed to conceive how a legislatively-regulated industry engaged in the performance of an "activity thoroughly affected with the public interest, . . ." *N. J. S. A.* 48:13A-2, could be anything other than a legitimate, indeed a vital, subject of both intrastate and interstate commerce.

While it is thus clear that the valuable service of collecting and disposing of solid waste is an activity in interstate commerce, it is also clear that solid waste itself is

often a merchantable commodity.[11] In *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super.* 160, 170 (Ch. 1974), rev. other grnds. 68 *N. J.* 451 (1975), the companion case to the within matter, the trial court rejected appellee's argument that solid and liquid waste is neither merchantable nor a legitimate subject of interstate commerce: ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal and production of electricity". The New Jersey Supreme Court agreed, saying:

> "We readily recognize that modern technology is such that certain types of solid waste may have legitimate market value for recycling or other purposes. We therefore agree with the decision below, insofar as the HMDC regulations are concerned, that they cannot be sustained on the theory that no item of interstate commerce is involved, as these regulations do clearly attempt to exclude from the HMD even those types of wastes which may have some potentiality of useful renewal."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 467-468.

Sanitary landfilling is itself a method of recycling and resource recovery. Solid waste can be accepted for disposal at a sanitary landfill facility and used in a cost efficient and environmentally sound manner to recover severely mined or devastated lands and to produce gas for com-

11. A United States District Court has recently held that the movement of automobile hulks across state lines constitutes interstate commerce. *Alexandria Scrap Corporation v. Hughes*, 391 *F. Supp.* 46, 59 (Md. 1975); prob. jur. noted, 96 *S. Ct.* 31 (1975), Auto bodies are specifically included within the definition "bulky waste" in the Rules of the Bureau of Solid Waste Management. *N. J. A. C.* 7:26-1.4.3. (A147).

mercial purposes (A275-279). It can also be utilized to create power generation by incineration.

Land recovered through sanitary landfilling is frequently devoted to public recreational use and green acres (A277). It may also be used for residential, commercial and industrial development. Problems previously encountered at former sanitary landfill sites with respect to support of heavy structures can be avoided by merely leaving certain land areas untouched in the landfilling process (A276). The key, in every situation, is responsible professional planning before sanitary landfill operations commence. Since New Jersey sanitary landfills must be developed in accordance with plans and designs prepared by licensed professional engineers, *N. J. A. C.* 7:26-2.2.3; 7:26-2-4, the purpose to which the site will be devoted upon completion of the sanitary landfill process may be known before any operations begin, *N. J. A. C.* 7:26-2.12.2.22.

Significantly, the *New Jersey State Solid Waste Management Plan*, approved by the United States Environmental Protection Agency as the official State plan for New Jersey, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra*, at 463, frankly states:

> "It is not unusual for a properly designed and constructed sanitary landfill to become an asset to the local area." [12]

On occasion, the free flow of commerce has been the subject of state regulatory action. In the absence of controlling federal legislation or implied federal preemption, a state may exercise its police power to prevent deception or fraud upon the public, *Plumley v. Massachusetts*, 155 *U. S.* 461 (1894), *Hebe Co. v. Shaw*, 248 *U. S.* 297 (1919), *Hygrade Provision Co. v. Sherman*, 266

12. *New Jersey Solid Waste Management Plan* (Newark: Planners Associates, Inc., 1970) at p. 71.

U. S. 497 (1925), the prompt disposal of large animals not slaughtered for food, *Clason v. Indiana*, 306 *U. S.* 439 (1939), and the importation of unhealthy swine or cattle, *Asbell v. Kansas*, 209 *U. S.* 251 (1908); *Mintz v. Baldwin*, 289 *U. S.* 346 (1933), decayed, noxious or adulterated foods, *Crossman v. Lurman*, 192 *U. S.* 189 (1904); *Savage v. Jones*, 225 *U. S.* 501 (1912), *Price v. Illinois*, 238 *U. S.* 446 (1915), or immature citrus fruits unfit for human consumption, *Sligh v. Kirkwood*, 237 *U. S.* 52 (1915). However, a state may not, even in these situations, exclude articles of commerce with impunity.[13]

A regulation designed to protect the public health must be reasonable in its requirements, promote its objective without discrimination, and not go beyond the necessities of the particular case: [14]

> "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals,—a matter of great importance

13. In *Schollenberger v. Pennsylvania*, 131 *U. S.* 1 (1898), this Court held that a statute prohibiting the sale in Pennsylvania of any oleaginous substance, other than that produced from unadulterated milk or cream, violated the Commerce Clause:

> . . . absolute prohibition of an unadulterated, healthy and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure
>
> • • •
>
> . . . it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a State to absolutely prohibit the introduction within its borders of an article of commerce, which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one.

14. See *Bourjois, Inc. v. Chapman*, 301 *U. S.* 183, 187 (1937); *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951); *Great A. & P. Tea Co v. Cottrell*, — *U. S.* —, 47 *L. Ed.* 2d 55 (1976).

> to the people of the state. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but, without discrimination, sought to promote fair dealing in the described articles of food."
>
> *Savage v. Jones*, 225 U. S., *supra*, at 525.

An identical sentiment was expressed in *Plumley v. Massachusetts*, 155 U. S. 461, 471 (1894), where this Court, in upholding a statute prohibiting the manufacture or sale of oleomargarine colored in imitation of yellow butter, said: "If the Statute of Massachusetts had been so framed as to be applicable only to oleomargarine manufactured in other states, . . . the case would have been wholly different".

Although countless opportunities were presented, Appellees never contended by any affidavit that (a) the transportation, treatment or disposal of solid or liquid waste in accordance with applicable federal and state laws and regulations poses any material threat to the health, welfare and safety of the people of New Jersey or to the quality of its environment; (b) an unsuspecting public will be deceived or defrauded by the transportation, treatment or disposal of solid or liquid waste collected in another state; or (c) the inherent condition of solid waste is such that it will always spread pestilence and disease. Quite to the contrary, interstate disposal of solid waste has been carried on, without interruption, for many years. During that period, state regulations have applied equally to all solid waste regardless of the place of its collection.

The interstate transportation of solid and liquid waste for treatment and disposal represents a legitimate, indeed a necessary and vital, activity in interstate commerce.

B.

P. L. 1973, c. 363, on Its Face Discriminates Against and Directly Burdens Interstate Commerce.

The plain and unambiguous language of *P. L.* 1973, *c.* 363, entitled:

> "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State . . . ,"

reveals that its sole intent and purpose is to impose an immediate, absolute, and complete ban upon the movement into or through New Jersey of any solid or liquid waste which originated or was collected outside the State. Treatment of liquid waste, processing of solid waste, and disposal or interstate movement of all waste collected outside New Jersey is equally prohibited. Conversely, no attempt whatsoever has been made in the statute to control, regulate or prohibit the movement, treatment, processing or disposal of solid or liquid waste which originates or is collected within the State of New Jersey.

Activities in interstate commerce are not, by that fact alone, immune from reasonable regulations adopted by a state or local government pursuant to the exercise of its reserved police power. *U. S. Const.*, Amend. 10. As reiterated by Mr. Justice Rutledge in *Nippert v. Richmond*, 327 U. S. 416, 425 (1947), ". . . not all burdens upon commerce, but only undue or discriminatory ones, are forbidden"; and in *Cities Service Co. v. Peerless Co.*, 340 U. S. 179, 186-187 (1950), Mr. Justice Clark observed:

> "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state

interest and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions."

Absent controlling federal legislation, the commerce clause does not deprive the states of the power to regulate matters of local public concern in those areas where uniformity of regulation is not necessary, as long as the exercise of the police power serves a real and legitimate purpose and does not place an undue or excessive burden on or discriminate against interstate commerce.

The test has been stated most recently by this Court in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970);

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows:
>
> *Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld* unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 372 U. S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally, the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona*, 325 U. S. 761, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. See e.g. *Schafer v. Farmers Grain Co., supra.*" (Emphasis added)

See also *Great A. & P. Tea Co. v. Cottrell*, — U. S. — , 47 L. Ed. 2d 55 (1976).

Pursuant to the test announced in *Pike*, a balance will *not* be made between the burden imposed on interstate commerce, on the one hand, and the putative local benefits, on the other hand, unless it is first determined that the regulation (a) is evenhanded, (b) is based upon a legitimate local purpose, and (c) only incidentally affects interstate commerce. If it is defective on any of these grounds, then the regulation must fall.

1. Evenhandedness.

A prohibition directed solely against solid or liquid waste which originates or is collected *outside* the State, and against the movement of such waste through New Jersey, is not evenhanded, and constitutes a direct burden and discriminatory regulation of interstate commerce. Discrimination against interstate commerce in any form or method is prohibited by the Commerce Clause. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 185 (1938).

In the single paragraph of its opinion devoted to the discrimination issue, the New Jersey Supreme Court commented:

> "Nor has there been discrimination, at least in the economic sense. In examining this point we must look to the ends sought to be achieved. Here the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions. Nor is there any real or

significant discrimination in favor of local collectors. Refuse amassed by them outside the State may not be brought into New Jersey. Conversely, residents of other states are free to collect and dump within the state."

Hackensack Meadowlands v. Mun. Landfill Auth., 68 *N. J.*, *supra*, at 475.

In *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951), this Court struck down an ordinance of the City of Madison, Wisconsin, which prohibited the sale of milk as pasteurized unless it was processed and bottled at an approved pasteurization plant within a five mile radius from the central square of Madison. In response to Madison's argument that the ordinance was aimed simply at protecting the health of the community, Mr. Justice Clark wisely noted that to sustain an ordinance simply because it denominates itself

". . . a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance, where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

The Court's responsibility in this area has been emphasized by Mr. Justice Reed in *Best & Co. v. Maxwell*, 311 *U. S.* 454, 455-456 (1940) where he commented:

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

This responsibility has been undertaken conscientiously and with great care by the Court. In *Railroad Co. v. Husen*, 95 *U. S.* 465 (1877), the United States Supreme Court struck down a Missouri statute which prohibited the entry of Texas, Mexican or Indian cattle into any county in the State between the first day of March and the first day of December of each year.

Speaking for a unanimous Court, Mr. Justice Strong announced the general rule governing sanitary and health laws as follows:

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection.

Railroad Co. v. Husen, 95 *U. S.*, *supra*, at 472.

Applying this rule to the statute of Missouri, Mr. Justice Strong found a clear attempt to regulate interstate commerce:

"It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December 1 in any year, no matter whether they

> are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."
>
> *Railroad Co. v. Husen*, 95 *U. S. supra*, at 473.

In *Plumley v. Massachusetts*, 155 *U. S., supra*, at 469, Mr. Justice Harlan had occasion to discuss the holding in the *Railroad Co.* case. He noted that the object and effect of said statute ". . . was to meet at the borders of Missouri a *large and common subject of commerce* and prohibit its crossing the state line during the larger part of each year. . . ." (Emphasis added.)

A statute enacted to prevent the sale of unwholesome meat was considered and struck down in *Brimmer v. Rebman*, 138 *U. S.* 78 (1891). The statute declared it to be unlawful to offer for sale within Virginia any beef, veal or mutton, from animals slaughtered one hundred miles or more from the place at which it is offered for sale unless previously inspected and approved by local inspectors. Inspection was not required of fresh meats from animals slaughtered within one hundred miles from place of sale.

Rejecting the state's contention that the statute represented a valid police regulation reasonably designed to protect the public health, Mr. Justice Harlan stated:

> "Whether there shall be inspection or no, . . . is made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered. . . . [A state] may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.
>
> *Brimmer v. Rebman*, 138 *U. S., supra*, at 82.

See also *Minnesota v. Barber*, 136 *U. S.* 313 (1890) and *Scott v. Donald*, 165 *U. S.* 58 (1897).

In *Rasmussen v. Idaho*, 181 *U. S.* 198 (1901), this Court upheld an Idaho statute which empowered the Governor of Idaho to regulate or prohibit the importation into the state of sheep from localities outside the state where scab or other infectious disease has become epidemic. Speaking for a unanimous Court, Mr. Justice Brewer distinguished the *Railroad Co.* case upon which the plaintiff in error in *Rasmussen* largely relied:

> "It will be perceived that *the act in Railroad Co. v. Husen was an absolute prohibition* operative during eight months of the year. *It was an act* continuous in its force; provided for no inspection, and was *predicated on the assumption that the State had the right to exclude* for two-thirds of each year *the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.*
>
> In the case before us the statute makes no absolute prohibition of the introduction of sheep,

but authorizes the Governor to investigate the condition of sheep in any locality, and, if found to be subject to scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the State as shall seem to him, after conference with the State sheep inspector, to be necessary."

Rasmussen v. Idaho, 181 *U. S. supra*, at 201. (emphasis added)

A similar quarantine act was considered in *Oreg.-Washington Co. v. Washington*, 270 *U. S.* 87 (1926). The Washington Director of Agriculture, with the approval of the Governor, forbade the importation into the state of alfalfa hay or meal (except in sealed containers) from designated counties outside the state in which, upon inspection, a weevil injurious to the alfalfa plant was found. After reciting the general rule that, absent arbitrariness or discriminatory motive, a state may prevent the introduction within its borders of human beings, animals or plants which may cause disease, injury or destruction to the State's inhabitants and resources, this Court upheld the statute commenting:

"We think that here the investigation required by the Washington law and the investigation actually made into the existence of this pest and its geographical location makes the law a real quarantine law, and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the conditions which might make its importation dangerous."

Oreg.-Washington Co. v. Washington 270 *U. S., supra*, at 96.

The New Jersey Statute in question imposes an unlimited prohibition without regard to condition. It is an embargo. There is no provision for inspection or for any other deliberative process *prior to* exclusion. The statute is erroneously predicated on the assumption that a state has the right to exclude the introduction of all kinds of solid and liquid waste, whether likely to impair public health and environmental quality or not. *Rasmussen v. Idaho*, 181 *U. S., supra*, at 201.

As in the *Railroad Co.* case, *P. L.* 1973, *c.* 363, is neither a quarantine law nor an inspection law; and like the statute in that case, *P. L.* 1973, *c.* 363 says to all natural persons and to all transportation companies: "You shall not bring into the State solid or liquid waste of any nature or description, for any purpose whatsoever, no matter whether it does an injury to the inhabitants of the State or not; no matter whether it does an injury to the quality of the environment or not; and if you do bring it in even for the purpose of carrying it through the State without unloading it you shall be subject to extraordinary liabilities."

The fact that *Railroad Co. v. Husen* dealt with cattle and not with solid waste is neither material nor distinguishable. The principle is identical in each case; once an activity is legitimately in interstate commerce there can be no discrimination. *Best & Co. v. Maxwell*, 311 *U. S.* 454 (1940); *Head v. New Mexico Board*, 374 *U. S.* 424, 429 (1963).

In the leading environmental case *Huron Cement Co. v. Detroit*, 362 *U. S.* 440 (1960), an action was instituted by a corporation engaged in operating federally licensed steam vessels in interstate commerce to enjoin the enforcement of certain provisions of the Smoke Abatement Code of the City of Detroit. Finding that the ordinance applied

equally to all ships and did not destroy the right of free passage, this Court held that the ordinance was a valid exercise of the state's police power:

> ". . . state regulation based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand.
>
> "It has not been suggested that the local ordinance, applicable alike to 'any person, firm or corporation' within the city, discriminates against interstate commerce as such. *It is a regulation of general application,* designed to better the health and welfare of the community. . . ." *Huron Cement Co. v. Detroit,* 362 *U. S., supra,* at 448 (Citations omitted, emphasis added.)

Although a smoke abatement ordinance enacted to promote the health and welfare of a city's inhabitants will generally support an exercise of the police power, the power to adopt such ordinances is not unlimited.

> "The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. *Even-handed local regulation* to effectuate a legitimate local public interest is valid unless preempted by federal action . . ., or unduly burdensome on maritime activities or interstate commerce. . . ."
>
> *Huron Cement Co. v. Detroit,* 362 *U. S. supra,* at 443 (Citations omitted, emphasis added).

The Court, in *Huron,* stressed the fact that the local ordinance there in question was applicable alike to all persons, firms and corporations. Had the ordinance been discriminatory, it surely would have been struck down.

For example, if the City of Detroit had attempted to reduce air pollution and thereby promote the health and welfare of the city's inhabitants by prohibiting the discharge of smoke in the Port of Detroit by any steam-powered vessel shipping out of another port while permitting such discharge by local vessels, then the ordinance would certainly represent an unconstitutional discrimination against interstate commerce.

Similarly, if the State of New Jersey had attempted to reduce air pollution by prohibiting any person from driving a motor vehicle upon the roads of this state unless the vehicle was registered in New Jersey, there would be an unmistakable and intolerable discrimination against interstate commerce.

If there is a threat posed to the health, welfare and safety of the people of New Jersey or to the quality of its environment by the treatment or disposal of solid and liquid waste in accordance with regulations administered by the Department of Environmental Protection (a position which appellants do not believe can be factually supported), *then it is a threat attributable to the nature of the substance being regulated, and not to its place of origin.* Remedial measures based upon the exercise of the State's police power must be undertaken in an even-handed manner. There can be no discrimination in favor of intrastate commerce and against interstate commerce. *Hale v. Bimeo Trading Co.,* 306 *U. S.* 375, 380 (1939).

During the last few years, state and federal courts have been called upon with increasing regularity to review legislation dealing with the maintenance of environmental

values: *American Can Co. v. Oregon Liquor Control Commission*, 15 *Ore. App.* 618, 517 *P.* 2d 691, 703 (Ct. App. Ore. 1973) (ban on non-returnable beverage containers); *Soap and Detergent Association v. City of Chicago*, 357 *F. Supp.* 44 (N. D. Ill. 1973), rev. *Proctor & Gamble Co. v. City of Chicago*, 509 *F.* 2d 69, 78 (7th Cir. 1974), *cert.* den. 421 *U. S.* 978 (1975) (ban on phosphate detergents); *Portland Pipe Line Corp. v. Environmental Imp. Com'n.*, 307 *A.* 2d 1, 40 (Sup. Jud. Ct. Me. 1973); app. dis., 414 *U. S.* 1035 (1973) (prevention and control of marine oil spillage); *Construction Ind. Ass'n., Sonoma Cty. v. City of Petaluma*, 522 *F.* 2d 897, 909 (9th Cir. 1975) (ban on further building); *Bowie Inn, Inc. v. City of Bowie*, 274 Md. 230, 335 *A.* 2d 679, 688 (Ct. App. Md. 1975) (return deposit requirement).[15]

While the statutes and ordinances in the aforesaid cases were upheld against attacks based upon alleged violations to the Commerce clause, each court was careful to note the absence of discriminatory treatment. Intrastate commerce was treated equally with interstate commerce.

Thus, in *Portland Pipe Line Corp. v. Environmental Imp. Com'n.*, 307 *A.* 2d 1 (Sup. Jud. Ct. Me. 1973), app. dis., 414 *U. S.* 1035 (1973), the Supreme Judicial Court of Maine was called upon to review the constitutionality of an act relative to overwater transfers of petroleum. Plaintiff's challenge of the act was based, in part, upon an alleged impermissible burden on interstate commerce. The Court rejected this argument, saying:

15. See also *Cohen v. Bredehoeft*, 290 *F. Supp.* 1001, 1004 (S. D. Tex. 1968) where, in upholding a municipal ordinance prohibiting fireworks within the city, the court said: "The ordinance treats all fireworks distributors, whether local or foreign, equally and its affect on interstate commerce is incidental to its primary purpose of protecting the public."

"The issue of whether regulations promulgated under the state's police power seeking to protect the state's inhabitants from environmental pollution may be applied to those engaged in interstate commerce was before the Supreme Court in Huron Portland Cement Co. v. City of Detroit, 362 U. S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960). The City had adopted a smoke abatement ordinance and sought to enforce the penal provisions of that ordinance against shippers admittedly engaged in interstate commerce.

• • •

The Detroit ordinance did not discriminate against interstate commerce and there was no showing that national uniformity was required to prevent inconsistent local regulations.

The Maine Act does not discriminate in favor of intrastate commerce. . . ."

Portland Pipe Line Corp v. Environmental Imp. Com'n., 307 A. 2d, *supra*, at 40. (Emphasis added)

In *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super.* 160 (Ch. 1974) the companion case to the case at bar, Judge (now Justice) Sidney Schreiber[16]

16. Subsequent to his decision in the *Hackensack Meadowlands* case, Judge Schreiber was elevated to the New Jersey Supreme Court. The *Hackensack Meadowlands* case was appealed by the State and consolidated for oral argument with the within-captioned matter. Both cases were disposed of in the same opinion. Understandably, Justice Schreiber did not participate in the proceedings before the New Jersey Supreme Court. However, it is evident from his opinion in *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super. supra*, that a vigorous dissent would have been interposed if he had participated.

struck down regulations adopted by the New Jersey Department of Environmental Protection and the Hackensack Meadowlands Development Commission which prohibited persons engaged in the collection of solid or liquid wastes which originated or were collected outside the State from disposing of same in the Hackensack Meadowlands District. In language equally pertinent to the present matter, Judge Schreiber observed:

> "DEP and HMDC rationalize that discrimination is absent because the regulations do not prefer New Jersey over out-of-state landfill operators or garbage haulers. The difficulty with that rationale is that *it is the discrimination based on the origin of the refuse, not the residence of the owner or carrier, which is invidious.* Transportation of the refuse, whether carried by New Jerseyans or nonresidents, in interstate commerce is directly affected by the ban.
>
> Although the State's objective in attempting to conserve a local natural resource for local needs is a proper police power purpose, that cannot be accomplished by discrimination based on the source of the refuse."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super., supra,* at 174. (Emphasis added.)

A state cannot discriminate against interstate commerce under the guise of protecting the health of its citizens or its natural resources. The Court has a duty to determine for itself whether the regulation represents a valid exercise of the State's police power, or whether it is really and substantially a regulation of interstate commerce. *Asbell v. Kansas*, 209 *U. S.* 251, 256 (1908). The independent exercise of that duty is especially important because the power to determine the articles which may be the subject of commerce is, in effect, the controlling one. *Bowman v. Chicago & Railway Co.*, 125 *U. S.* 465 (1888).

Legislation designed to prohibit the treatment or disposal in New Jersey of solid waste collected outside the State was first proposed six years ago with the introduction of S. 834 in the New Jersey Senate on May 4, 1970.[17] Section 2 of that bill, entitled "An Act to prevent the treatment and disposal within this State of solid waste collected outside this State", provided as follows:

> "Notwithstanding the provisions of any other law to the contrary, no solid waste collected from any location without the territorial limits of this State shall be treated or disposed of in any solid waste disposal facility located within this State."

By written memorandum dated May 8, 1970,[18] the Commissioner of the New Jersey Department of Environmental Protection advised the Governor that the Department supported ". . . the concept of prohibiting the importation of out-of-state garbage" into New Jersey, and recommended that the bill be signed, if passed by the legislature. The reason for the Department's position was explained by the Commissioner as follows:

> ". . . The amount of land available in landfills is rapidly being depleted. It is in the interests of the State to reserve the available land for

17. Copies of bills introduced in the New Jersey Legislature are available at the New Jersey State Library in Trenton, New Jersey.

18. Said memorandum is contained in the file of the Counsel to the Governor, maintained in the State Archives at the New Jersey State Library, Trenton, New Jersey.

> the disposal of solid wastes originating in the State."

No mention was made of public health or environmental quality.

Although S. 834 passed the Senate, it did not move in the Assembly and died at the end of the legislative session.[19]

A bill almost identical to S. 834, A. 1019, was introduced in the New Jersey Assembly on April 12, 1972 by Assemblyman Dawes. Like its predecessor, A. 1019 expressly prohibited the treatment or disposal in New Jersey of any solid waste collected outside the State.

Less than one month later, on May 4, 1972, a second bill, A. 1132, the Waste Control Act, was introduced by the same Assemblyman. Unlike A. 1019 which contemplated direct statutory prohibition, A. 1132 conferred upon the Commissioner of the Department of Environmental Protection the power to regulate and prohibit the incineration and landfill in New Jersey of solid waste collected outside the State. In his "statement" attached to the bill, Assemblyman Dawes commented:

> ". . . This bill recognizes that the citizens of New Jersey do not have the luxury of unlimited resources and disposal sites. The bill also reflects an awareness that the continuing use of New Jersey lands for solid waste disposal facilities . . . presents an unfortunate picture of the State, particularly in the Hackensack Meadowlands area."

By memorandum dated October 3, 1972,[20] the President of the New Jersey Public Utilities Commission urged

19. Information with respect to bills introduced in the New Jersey Legislature is available in the *New Jersey Legislative Index.*

20. See footnote 18, *supra.*

the Governor to veto A. 1132, if passed, due to the potential for retributive action:

> "If New Jersey prohibits waste collected outside the State from being dumped within the State, it may find that reciprocal action will be taken by neighboring states wherein New Jersey disposes of its solid wastes; e.g., Philadelphia dumps in New Jersey and New Jersey dumps in Pennsylvania."

A. 1019 was never adopted, but A. 1132 passed the legislature and was signed by the Governor on February 21, 1973. The adverse recommendation of the Public Utilities Commission was not accepted. Upon signing the bill, the Governor issued a press release[21] in which he stated that the Waste Control Act represented ". . . a significant step in controlling the daily influx of trash and garbage from adjoining states which threatens to engulf New Jersey's remaining sanitary landfill sites".

Although the Waste Control Act conferred upon the Commissioner of the Department of Environmental Protection the power to prohibit the incineration and landfill in New Jersey of solid waste collected outside the state, *N. J. S. A.* 13:1I-4a, no immediate regulatory action was undertaken by him. Perhaps that was because no immediate threat to the environment or public health was recognized by the Department.

Almost 8 months passed without further activity. Then, on October 19, 1973, Acting Governor Alfred N. Beadleston published a tersely worded press release (A53) saying:

> "I have today directed Commissioner Richard J. Sullivan of the Department of Environ-

21. Press releases issued by the Governors of New Jersey are now collected and maintained at the New Jersey State Library, Trenton, New Jersey.

mental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey. I have taken this action after consultation by telephone with Governor William T. Cahill and with his full support.

This ban will be accomplished either by legislation or by regulation issued by Commissioner Sullivan pursuant to the State Waste Control Act, Chapter 39 of the Public Laws of 1973. The State will proceed under whichever of those two legal methods is faster and more effective.

I have issued this directive after thorough consultation with Commissioner Sullivan and Attorney General Kugler. The ban against the dumping of garbage from either New York or Pennsylvania will be strictly enforced, when it becomes effective, with the full resources of the Department of Environmental Protection and the State Department of Law and Public Safety.

New Jersey cannot continue to tolerate the grave environmental dangers being created by the dumping of garbage in New Jersey from New York or any other state. This is a sovereign State, not a dumping ground, and this State Government will act decisively to protect the health and welfare of its citizens. Not only does out-of-state dumping pose immediate environmental and health problems, but over the long run, the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up.

Commissioner Sullivan will proceed immediately to draft the necessary regulation under the

Administrative Procedures Act, which prescribes a required timetable of public notice and public hearings. The Legislature will return Nov. 12 and, if it appears that it would be the most expeditious route, will be asked to approve the necessary legislation, under emergency procedures if possible."

Less than a month later, on November 8, 1973, the Commissioner published proposed Rules Governing the Bureau of Solid Waste Management. Section 7:26-1.8 of the proposed Rules contained a provision unconditionally prohibiting the disposal of out-of-state waste within New Jersey.[22]

The rationale for the proposed prohibition is explained in paragraph IV of the "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management" (A45-46). Curiously, references to public health and environmental quality are virtually non-existent. If "grave environmental dangers" were being created by the "dumping of garbage in New Jersey from New York", as acting Governor Beadleston had rhetoricized, the Department of Environmental Protection didn't know anything about it. The reasons expressed by the Department for the proposed administrative prohibition were: (1) to as-

22. The text of the proposed rule read as follows:

7:26-1.8 *Out of State Waste*

-1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.

-1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

sure the availability of landfill acres in New Jersey for solid waste generated in said State, and (2) to stabilize the cost of solid waste collection and disposal for New Jersey residents.[23]

Four days after the publication of the proposed Rules of the Bureau of Solid Waste Management, on November 12, 1973, S. 2367 was introduced in the New Jersey Senate. The stated purpose of the bill was to prohibit the entry into New Jersey of any solid or liquid waste which originated or was collected outside of the state, except garbage to be fed to swine within New Jersey.[24]

The Department of Environmental Protection was requested to submit its comment on the bill to the Office of the Counsel to the Governor. The comment submitted by the Department,[25] was surprisingly candid:

> "A. *Description of Bill's Effect—*
>
> Amends the existing Waste Control Act of 1973 by reversing the present burden of proof so that out-of-state solid and liquid waste will be banned unless the Department issues regulations permitting same. *No doubt this approach was taken—as opposed to an absolute ban—so as not blatantly to traverse the commerce clause of the Federal Constitution.*"
>
> • • •

23. This was specifically admitted by Appellees in their Answer to the Complaint filed in this action (A10, 97).

24. When S. 2367 was originally introduced, the clause ". . . except garbage to be fed to swine in the State of New Jersey," was not in the bill.

25. See footnote 18, *supra*.

> "E. *Departmental Comments—*
>
> *Out-of-state waste is clearly a problem but it is not necessarily insurmountable.* The Bureau of Solid Waste reports that *the major difficulty is that New York 'garbage' competes with the landfill sites in heavily populated areas which will tap out within a few years, in any case.* Thus, whereas such waste comprises no more than a small percentage of the total waste collected in the state, it is approximately 25% of the waste disposed in the New Jersey portion of the New York-New Jersey Metropolitan area. This is the truly critical region for solid waste. However, liquid waste from New York and Pennsylvania may even be needed by New Jersey processing plants, so as to reduce their per unit costs. The bill will clearly permit the Department to issue regulations allowing same where necessary or desirable."
>
> • • •
>
> (Emphasis added)

S. 2367 was passed by the Senate on November 19, 1973, and by the Assembly on November 26, 1973. While the bill was pending before the Governor for his review, Richard W. DeKorte, Counsel to the Governor, wrote to David Quient, Esquire, City Attorney for Appellant City of Glen Cove (A47-48), saying:

> • • •
>
> "Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination."

S. 2367 was signed by the Governor on January 2, 1974, *P. L.* 1973, *c.* 363.

Since the prohibitory legislation emanated from the Governor's office, it can be reasonably expected that the Governor's Counsel was well-versed in its *raison d'etre.*

The evidence, in its cumulative effect, overwhelmingly demonstrates that *P. L.* 1973, *c.* 363 was not adopted as a valid health measure, but was intentionally designed to directly burden and discriminate against interstate commerce. Indeed, Appellees readily admit that a purpose of the statute was to preserve landfill acres in New Jersey for solid waste generated in said state (A21,100).

In *Penna. v. West Virginia,* 262 *U. S.* 553, 597-598 (1923), a West Virginia statute prohibited the exportation of its natural gas unless an adequate supply was available to meet the needs of its citizens. Although the Supreme Court of the United States recognized that the gas supply was a natural product of the State and would be insufficient to meet the needs of the State if exportation was allowed, the statute had to fall because it represented "an attempt to regulate the interstate business to the advantage of the local customers".

Similarly, in *Oklahoma v. Kansas Nat. Gas Co.,* 221 *U. S.* 229, 255 (1911), this Court declared unconstitutional an Oklahoma "conservation" statute preventing a pipeline company from transporting natural gas outside the state:

> "If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principal? Thus, enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all States have it; *embargo may be retaliated by embargo and commerce will be halted at state lines.* And yet we have said that 'in matters of foreign and interstate commerce there are no state lines'. In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of *each State is made greater by a division of its resources, natural and created, with every State,* and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court." (Emphasis added)

See also *City of Altus, Oklahoma v. Carr,* 255 *F.* Supp. 828 (W. D. Tex. 1966).

The potential for retaliation is not a mere theoretical possibility in the present case. The Commonwealth of Pennsylvania has already enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. 35 *P. S.* § 6007 *et seq.* The legislation was intended to be retaliatory in operation and effect (A62).

Exclusionary and retaliatory legislation is destructive to the achievement of national goals. Such enactment places the well-being of a few over the well-being of the whole, and can lead to the kind of isolationism that the commerce clause was intended to prevent.

Mr. Justice Cardozo expressed the principle with great eloquence. In declaring unconstitutional a statute which prohibited the sale in New York of milk purchased in another state at a price lower than the minimum prescribed by the New York statute, he commented:

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."
>
> *Baldwin v. G. A. F. Seelig*, 294 *U. S.* 511, 523 (1935).

A statute which facially prohibits entry without regard to condition is ". . . hostile in conception as well as burdensome in result". *Polar Ice Cream & Creamery Co. v. Andrews*, 375 *U. S.* 361, 377 (1964). It represents discrimination of the most basic kind, and cannot be tolerated to stand.

2. Legitimate Local Purpose.

Despite the comprehensive regulation of the solid waste collection and disposal process by various state administrative agencies, the New Jersey Supreme Court found that *P. L.* 1973, *c.* 363 served a legitimate local purpose. This conclusion is without reasonable basis.

In 1958, the New Jersey Public Health Council adopted Chapter VIII-Refuse Disposal as part of the State Sanitary Code pursuant to authority conferred by *N. J. S. A.* 26:1A-7. Chapter VIII prohibited the operation of dumps and authorized the disposal of solid waste only through use of

> "(a) sanitary landfills established, conducted, operated and maintained in accordance with standards set forth in Regulation 4, 5, and 6 of this Chapter
>
> OR
>
> (b) Incinerators constructed, operated and maintained in accordance with Code or Regulation of the New Jersey Air Pollution Control Commission.
>
> (c) Other methods of disposal as may be approved by the State Department of Health."

The regulations collected in Chapter VIII-Refuse Disposal, were adopted, consistently with the mandate in *N. J. S. A.* 26:1A-7, ". . . to preserve and improve the public health in this State." [26]

On April 13, 1970, the Public Health Council adopted a revision of Chapter VIII of the State Sanitary Code which substantially expanded the previously-existing regulations. The authorized methods of disposal were not changed or altered in any way, but additional operational requirements were imposed to further protect the public health. On April 22, 1970, the functions, powers and duties of the Public Health Council were transferred to and vested in the Division of Environmental Quality and the Commissioner of the Department of Environmental Protection, *N. J. S. A.* 13:1D-7a. Chapter VIII of the State Sanitary Code was not repealed by the administrative reorganization; it remained in full force and effect, under the jurisdiction of the Department of Environmental Protection, *N. J. S. A.* 13:1D-15, 13:1E-66.

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26. *New Jersey State Sanitary Code* (Trenton: New Jersey State Department of Health, rev. September 1963) p. 1.

Approximately three months later, on July 31, 1970, the *New Jersey Solid Waste Management Plan* was published. Said Plan, approved by the United States Environmental Protection Agency as the official State Plan for New Jersey, reported with candor:

> "There is no technological reason why we cannot dispose of solid waste with minimal environmental harm.
>
> • • •
>
> "The Department of Environmental Protection, under Chapter 39, continues to enforce the Public Health Council State Sanitary Code as it pertains to refunse disposal. That is, the Bureau of Solid Waste Management still has Chapter VIII of the State Sanitary Code with which to regulate and assure nuisance-free operation of disposal sites in conformance with good practice and health standards." [27]

Chapter VIII of the State Sanitary Code continued in effect until July 1, 1974, when it was superceded by the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* In adopting said Rules, the Commissioner of the Department of Environmental Protection commented: "No rule was altered in such a way as to provide less protection to the public health, safety or welfare than provided by the Chapter VIII regulations," (A126).

The principal environmental engineer of the Bureau of Solid Waste management was more direct in his assessment of the Rules. During a deposition conducted on March 13, 1974, he grudgingly admitted that the Rules as

27. *New Jersey State Solid Waste Management Plan* (Newark: Planners Associates, Inc., 1970) at pp. 2 and 78.

then proposed were entirely adequate to protect the health, safety and welfare of the people of New Jersey and the quality of its environment (A109).

The Rules, which are extremely comprehensive in nature, provide that the exclusive methods by which solid waste may be disposed in New Jersey are through use of:

> "a. Sanitary landfills established, operated and maintained in accordance with the regulations set forth in this subchapter.
>
> "b. Incinerators constructed, operated and maintained in accordance with Regulations of the New Jersey State Department of Environmental Protection promulgated under authority of the Air Pollution Control Act 1954 and regulations set forth in this subchapter.
>
> "c. Transfer station, composting facility, resource recovery or other processing facility, constructed and operated in accordance with regulations set forth in this subchapter."
>
> *N. J. A. C.* 7:26-2.1.2

Dumps are expressly prohibited. *N. J. A. C.* 7:26-2.1.1.

No person may engage in the disposal of solid waste in New Jersey without having first obtained approval of a registration statement and engineering design from the Department of Environmental Protection. *N. J. A. C.* 7:26-2.2.2; 7:26-2.2.3. Designs for sanitary landfills, incinerators, and other methods of disposal must be prepared by a New Jersey licensed professional engineer and submitted to the Bureau of Solid Waste Management for its review, *N. J. A. C.* 7:26-2.4. In addition to other requirements, each engineering design for a sanitary landfill must include (a) a designation of the property or portion thereof

for which approval is being sought; (b) contours and proposed final elevations; (c) proposed sequence of development; (d) soil borings; (e) soil classifications; (f) soil profile and aquifer information; (g) geological and ground water data; (h) identification of registered wells and public buildings within a one-half mile radius; (i) surface and subsurface drains; (j) leachate collection system, if applicable; (k) profile views for excavation, and grades and elevations for dikes, berms or other pollution protection devices or techniques; (l) proposed landscaping, beautification and screening techniques; (m) gas venting and monitoring system; (n) ground water monitoring wells; and (o) estimated capacity. *N. J. A. C.* 7:26-2.12.2.

Special emphasis is placed upon the control and elimination of ground and surface water pollution at sanitary landfill sites. To accomplish this objective *N. J. A. C.* 7:26-2.5.4 provides, in pertinent part:

> "No new sanitary landfill shall be conducted, nor shall an existing landfill continue to be conducted where the solid waste, in whole or in part, or the leachate produced as a result of the sanitary landfill, impairs the quality of the surface or ground waters of this state to a degree that would degrade the quality of either the surface or ground waters of this state beyond the classification established by the Department for the surface water in question or the potable water standard established by the Department in the case of ground water." (A247)

In addition, *N. J. A. C.* 7:26-2.5.22 requires the installation of ground water monitoring systems as a condition precedent to the operation of a new sanitary landfill or the expansion of an existing facility:

> "No new solid waste facility shall begin operations without first installing a ground water monitoring system constructed and located in accordance with instructions furnished by the Department. Further, no new facility shall begin operations prior to obtaining ground water samples, and analyses thereof, for the purpose of establishing baseline information." (A249)

The Department of Environmental Protection can require the installation of an impermeable liner (A282), where necessary, to create a barrier between the deposited solid waste and exposed surfaces that would otherwise be unsatisfactory for land disposal purposes.

Gas venting systems must be installed at every existing sanitary landfill site, and at every new facility, as a condition of continued operation. In this connection, *N. J. A. C.* 7.26-2.5.21 provides:

> "New facilities shall install the gas venting and monitoring systems indicated on the approved engineering design prior to operating. A phase-in of the system is permitted if so indicated on the approved engineering design. Existing facilities shall be required to design, obtain departmental approval of the design, and implement a gas venting and monitoring system when so ordered by the Department as a result of the detection of landfill gases beyond the perimeter of the designated fill area. Detection may be by ground probing or vegetation damage. The recovery of landfill gases for use as a fuel is not prohibited by this subsection. In no case shall the accumulation of combustible gases in excess of their lower explosive limits within confined

> structures on or adjacent to the facility be permitted." (A249)

In addition to the aforesaid, a sanitary landfill must effectively control scattering of papers and other lightweight material, *N. J. A. C.* 7:26-2.5.6, dust, *N. J. A. C.* 7:26-2.5.7, odor, *N. J. A. C.* 7:26-2.5.8, and insects and rodents, *N. J. A. C.* 7:26-2.5.12. Other stringent and carefully conceived operational requirements, too numerous to mention, are also imposed by the Rules.

The situation with respect to the regulation of incineration is much the same. The construction and operation of incinerators for solid waste disposal is governed by both the Rules of the Bureau of Solid Waste Management, and by the Rules of the Bureau of Air Pollution Control, *N. J. A. C.* 7:27-11.1 *et seq.*

No person may construct a new incinerator, or use a new or altered incinerator, unless a "Permit to Construct, Install or Alter Control Apparatus or Equipment" and a "Certificate to Operate Control Apparatus or Equipment" have first been obtained from the Bureau of Air Pollution Control, Department of Environmental Protection, *N. J. A. C.* 7:27-11.4. In order to assure that incinerators and control equipment will not pollute the air,

> "The Department may require such details regarding the equipment or control apparatus as it considers necessary to determine that the equipment or control apparatus is designed to operate without causing a violation of any provisions of the New Jersey Air Pollution Control Act or any provisions of codes, rules or regulations promulgated hereunder. . . ."
>
> *N. J. A. C.* 7:27-8.4(b)

The Rules of the Bureau of Air Pollution Control contain specific emission standards with respect to particles emission, smoke emission, unburned waste or ash emission, and odor emission, *N. J. A. C.* 7:27-11.4. Most importantly, an incinerator cannot be constructed or used unless it is ". . . effective for the purpose of air pollution control". *N. J. A. C.* 7:27-11.2. See also *N. J. A. C.* 7:27-5.2(a) being a regulation of general applicability which prohibits the emission into the outdoor atmosphere of substances in quantities which shall result in air pollution. Open burning is specifically prohibited, *N. J. A. C.* 7:27-2.3.

An incinerator cannot be used for solid waste disposal purposes until an engineering design prepared by a New Jersey licensed professional engineer has been filed with and approved by the Bureau of Solid Waste Management. Such design must contain information with respect to (a) rated capacity, (b) current and anticipated daily loadings, (c) unloading and storage facilities, (d) emergency storage facilities, (e) alternate unloading locations, (f) rodent and odor control techniques, (g) daily residue tonnage, (h) disposal location of residue, and (i) accompanying recycling or reclamation activity, if any. *N. J. A. C.* 7:26-2.12.3.

The Rules regulate the operation as well as the design of incinerator facilities. Areas where putrescible waste is stored or deposited must be cleaned within each twenty-four hour period, and no such waste may be stored longer than twenty-four hours without acceptable treatment to prevent putrefaction. *N. J. A. C.* 7:26-2.11.1; 7:26-2.11.2. A program to control the scattering of papers and other lightweight material, *N. J. A. C.* 7:26-2.11.3, dust, *N. J. A. C.* 7:26-2.11.4, odors, *N. J. A. C.* 7:26-2.11.5, and

insects and rodents, *N. J. A. C.* 7:26-2.11.8 must be implemented at each facility.[28]

The New Jersey Department of Environmental Protection is not the only state administrative agency authorized to supervise the operation of solid waste facilities. Regulatory control is independently conferred upon, and may be exercised by, the Board of Public Utility Commissioners. *N. J. S. A.* 48:2-23 provides as follows:

> "The board may, after hearing, upon notice, by order in writing, require any public utility to furnish safe, adequate and proper service, including furnishing and performance of service in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State, and to maintain its property and equipment in such condition as to enable it to do so."

It is within this regulatory framework that the New Jersey Supreme Court upheld *P. L.* 1973, *c.* 363, as being a reasonable, non-discriminatory exercise of the State's police power which does not unduly burden interstate commerce.

Although a state has a responsibility to protect its people and their property, it is well-established that a police regulation which affects interstate commerce must not go beyond the necessities of the particular case. *Reid v. Colorado*, 187 *U. S.* 137, 151 (1902); *Smith v. St. Louis and Southwestern Ry. Co.* 181 *U. S.* 248, 256 (1901).

The prohibition imposed by *P. L.* 1973 *c.* 363, § 2, is not directed against treatment or disposal at all: it is specifically directed against entry. The effect of the statute

28. For other regulations, see *N. J. A. C.* 7:26-2.11 entitled: General Operational Requirements for Incinerators, Transfer Stations, Processing Facility, and Resource Recovery Facilities.

is both to prohibit entry and to prevent every administratively authorized and regulated form of disposal, whether expected to do injury to the inhabitants of the state or not.

Even if the New Jersey Supreme Court was correct in finding that the preservation of land represented a legitimate local purpose.[29]

> ". . . extending the lifespan of existing landfills and thereby preserving further acreage from use as disposal sites is a legitimate and valid exercise of the police power of the State."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 472.

then there was still no basis to prohibit (a) entry, and (b) other authorized and regulated forms of disposal, including resource recovery and incineration.

The statute went far beyond what was reasonable and necessary in order to accomplish its purpose.

It is interesting that "garbage to be fed to swine in the State of New Jersey" is statutorily excepted from the otherwise unlimited embargo imposed by *P. L.* 1973, *c.* 363. The word "garbage" is not synonymous or co-extensive with, but is narrower than, the term "solid waste". It is a word of art, separately defined in New Jersey as:

> ". . . all putrescible animal and vegetable wastes resulting from the handling, preparation, cooking and consumption of . . . food. . . ."
>
> *N. J. A. C.* 12:100-2.1 (Emphasis added)

29. The conclusion appears to be based upon the premise that sanitary landfills "degrade" land, and that acreage should not be devoted to that purpose. There is no evidence, either in the record or among the competent authorities, to support this view. Quite to the contrary, the New Jersey State Solid Waste Management Plan commented that properly designed and constructed sanitary landfills are frequently an asset to the community.

Putrescible waste [30] has a greater potential for harm to the public health than bulky waste,[31] construction waste [32] or demolition waste.[33] Yet garbage to be fed to swine can freely *enter* New Jersey, while non-putrescible wastes and garbage intended for other purposes cannot.

Although *P. L.* 1973, *c.* 363 contains a Legislative finding

> ". . . that the public, health, safety, and welfare require that the treatment and disposal within this State of *all* wastes generated outside of the State be prohibited",
>
> *N. J. S. A.* 13:1I-9. (Emphasis added)

the Commissioner of the Department of Environmental Protection is specifically empowered to find that the entry of solid and liquid waste collected in another state

> ". . . can be permitted without endangering the public health, safety and welfare. . . ."
>
> *N. J. S. A.* 13:1I-10.

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30. *N. J. A. C.* 7:26-1.4.46—"Any waste liable to enter into a state of putrefaction, the typically anaerobic splitting of proteins by bacteria and fungi with the formation of foul-smelling, incompletely oxydized products."

31. *N. J. A. C.* 7:26-1.4.3—"Large items of solid waste which because of their size or weight requires handling other than normally used for municipal solid waste. Bulky waste includes but is not limited to such items as tree trunks, auto bodies, demolition or construction material, appliances, furniture, and drums."

32. *N. J. A. C.* 7:26-1.4.14—"Waste building material and refuse resulting from construction, remodeling, and repair operations on houses, commercial buildings, pavements, and other structures."

33. *N. J. A. C.* 7:26-1.4.17—"Waste generated from the razing of buildings, factories, and other man-made structures, including streets, roads, and fences."

This presents a paradox of the first order: if the prohibition against treatment and disposal of out-of-state wastes is actually required to protect the public health, safety and welfare, as found by the legislature, then a delegation of power to the Commissioner of the Department of Environmental Protection to permit and regulate the entry of wastes for treatment and disposal is inconsistent and unexercisable; conversely, if the Commissioner determines, pursuant to the power delegated to him by the legislature, that wastes generated in another state can enter New Jersey without adversely affecting the public health, safety and welfare, then the legislative finding is erroneous.

Sixteen days after the enactment of *P. L.* 1973, *c.* 363, and in accordance with the authority granted to him in said legislation, the Commissioner adopted *N. J. A. C.* 7:1-4 as an emergency regulation to become effective on the same date as the statute, February 1, 1974. Although said rule followed *P. L.* 1973, *c.* 363 in declaring a general prohibition against the entry into New Jersey of solid or liquid waste collected outside the State,

> "No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State,"

certain designated wastes including pesticides, hazardous waste and chemical waste entering the State solely for processing or treatment were excepted from the generalized entry ban. *N. J. A. C.* 7:1-4.2. This action by the Commissioner was exceedingly significant for at least two reasons: (a) contrary to a *contemporaneous* legislative finding, it demonstrated that the public health, safety and

welfare, in actuality, did *not* require that the *entry* of *all wastes* generated outside the State be prohibited, and (b) if substances noxiously designated "hazardous waste" could be carried into New Jersey and treated therein *without further regulation of transportation*, then it follows that the *mere entry and treatment* of any other less hazardous waste *does not* endanger the public health, safety and welfare.

The legitimacy of the legislative finding in *P. L.* 1973, *c.* 363, § 1 was implicitly challenged by the Commissioner by the adoption of *N. J. A. C.* 7:1-4. Said emergency regulation was predicated upon an immediate serious threat to the public health, safety and welfare if certain solid and liquid wastes were excluded from New Jersey (A93):

> "WHEREAS, the *imminent ban upon the importation* into this State *of wastes* intended for resource recovery and recycling facilities, and of those hazardous chemical, pesticide, bulk liquid and bulk semi-liquid wastes intended for treatment, processing or recovery facilities *presents both and immediate and long-term peril to public health, safety and welfare* . . . ." (Emphasis added)

Part of the "peril" identified by the Commissioner was the economic survival of certain solid waste facilities (A93):

> "WHEREAS, the proper treatment, processing or recovery of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes frequently requires the use of elaborate processes and equipment; and

> "WHEREAS, it is apparent that the *economic survival* of solid waste facilities utilizing such elaborate processes and equipment for the proper treatment, processing or recovery of . . . wastes generated within the State is dependent upon the acceptance of those wastes generated or collected outside the territorial limits of this State; . . . ." (Emphasis added)

The Commissioner's remarks with respect to economic survival are especially noteworthy and equally applicable to sanitary landfill and incineration sites where the cost of land, equipment and environmental controls is staggering (A264, 270 and 282); a fact equally recognized by the New Jersey legislature, *P. L.* 1975, *c.* 326, § 3, amending *N. J. S. A.* 13:1E-2c.

The inherent danger involved in adopting a statute which excludes all commerce, subject to a condition subsequent, is that articles of commerce may, unintentionally or otherwise, be unconstitutionally caught in the prohibition. That is precisely what has happened here. Of the many examples which might be postulated, one will suffice.

Automobile bodies are included in the general category of "bulky waste" as defined by the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1.4.3. The word "disposal" is not limited to final disposition, but also contemplates storage, treatment, utilization and processing, *N. J. A. C.* 7:26-1.4.20. Thus, the transportation of automobile bodies into New Jersey for storage pending subsequent shipment to an out-of-state site is prohibited by *P. L.* 1973, *c.* 363 and by *N. J. A. C.* 7:1-4.

It is clear, therefore, that the power conferred upon the Commissioner to permit the entry of solid and liquid wastes which are otherwise prohibited by *P. L.* 1973, *c.* 363 does not save the statute from an attack on Commerce

Clause grounds.[34] Rather, it illustrates the critical weakness and manifest impropriety of the statute. All out-of-state wastes are excluded until the Commissioner affirmatively acts. The Commissioner is neither compelled to act nor to deal with solid and liquid wastes collected within the state. And once adopted, regulations may be amended or repealed, at will, with relative ease.[35]

On June 28, 1974, approximately six months after the enactment of *P. L.* 1973, *c.* 363, the Commissioner of the Department of Environmental Protection adopted the Rules of the Bureau of Solid Waste Management. According to the principal environmental engineer of the Bureau, the collection and disposal of solid waste in accordance with said rules does not pose any substantial or material threat to the health, welfare and safety of the people of New Jersey or to the quality of the environment (A109). That being the case, one is hard-pressed to discern the reason why the Commissioner, by his inaction, permits the exclusion of out-of-state waste to continue. Since there is no qualitative difference between solid waste which originates or is collected outside the

34. Although the New Jersey Supreme Court appeared to view *N. J. A. C.* 7:1-4 as having a "confining effect" on *P. L.* 1973, *c.* 363, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 468, Appellants respectfully submit that powers cannot be delegated to a state administrative agency by an unconstitutional statute. Even if they could, the emergency regulations adopted by the Commissioner continue to exclude accepted subjects of commerce.

35. *N. J. A. C.* 7:1-4 was adopted pursuant to that section of the New Jersey Administrative Procedure Act, *N. J. S. A.* 52:14B-1 *et seq.* which dispenses with notice and an opportunity to be heard prior to the adoption of a regulation if an imminent peril is identified, *N. J. S. A.* 52:14B-4(c):

> "If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable to adopt the rule."

State of New Jersey and that which originates or is collected within the State (A21, 100), the discriminatory treatment against interstate commerce is inexplicable. For example, if solid waste collected in New Jersey can be incinerated in accordance with regulations adopted by the New Jersey Department of Environmental Protection, what harm can be done by permitting the incineration of qualitatively identical wastes collected outside the State? To ask the question is to answer it.

The disposal of solid waste in accordance with presently existing laws and regulations and in conformance with sound engineering practices[36] does not present a serious threat to health or environmental safety. Appellees have never, by affidavit, disputed this conclusion, which is generally accepted throughout the United States.

In *Horn v. Community Refuse Disposal, Inc.*, 186 *Neb.* 43, 180 *N. W.* 2d 691 (Sup. Ct. 1970), plaintiffs brought an action to enjoin the establishment and operation of a sanitary landfill. The court denied the application saying:

> "The evidence is persuasive that it is possible to operate a sanitary landfill so that it will not emit offensive odors, pollute ground waters, or be attractive to rodents. The rules and regulations adopted in 1969 enforcible by the State Department of Health under statutory authority are reasonably designed to produce that result."
>
> *Horn v. Community Refuse Disposal*, 180 *N. W.* 2d, *supra*, at 692.

The overwhelmingly accepted rule is that incinerators and sanitary landfills which are properly maintained and

36. A design prepared by a professional licensed engineer must be submitted to and approved by the Bureau of Solid Waste Management as a condition precedent to the operation of any new sanitary landfill or the expansion of any existing facility. *N. J. A. C.* 7:26-2.2.3.

operated are not public nuisances; *Wood v. Town of Wilton*, 156 *Conn.* 304, 240 *A.* 2d 904 (Sup. Ct. 1968); *Rocchi v. Zoning Bd. of App. of Town of Glastonbury*, 157 *Conn.* 106, 248 *A.* 2d 922 (Sup. Ct. 1968); *Myers v. City of Hagerstown*, 214 *Md.* 312, 135 *A.* 2d. 147 (Ct. App. 1957) (and cases therein cited); Annotation, *"Public Dump as Nuisance"*, 52 *ALR* 2d 1134.

All too often, the words "sanitary landfill" and "dump" are confused with one another.[37] They are very different entities.[38] The Rules of the Bureau of Solid Waste Management define a sanitary landfill as:

37. See *Municipal Refuse Disposal*, 3rd ed. (Chicago: Public Administration Service, 1970), pg. 93, wherein it is stated:

> Although the sanitary landfill as a method of refuse disposal was given a clean bill of health many years ago, its acceptance by the public is still far from unanimous. The public has too often heard the terms "landfill", "dump", and "sanitary landfill" used interchangeably and does not understand the difference between a sanitary landfill and a landfill or dump. 'Unfortunately there are too many disposal facilities labeled "sanitary landfills" which are glaringly deficient in some of the essential elements. The 1968 National Survey shows that 94 per cent of all landfill refuse disposal projects fall short of complying with all criteria for fully acceptable operations. The resulting public image of sanitary landfills has been damaging.
>
> A well-located, well-designed, and efficiently operated sanitary landfill meets public health standards and requirements for control of air and water pollution, fire, and nuisances:
>
> 1. Vector breeding or sustenance is prevented by eliminating harborage and food supply for rats, flies, and other vermin.
>
> 2. Air pollution by dust, smoke, and odor is controlled.
>
> 3. Fire hazards are controlled during operational phases. (They are negligible in a completed fill.)
>
> 4. Pollution of surface and ground waters is precluded.
>
> 5. All nuisance factors are effectively controlled; i.e., the system is aesthetically acceptable and noise is kept to a minimum.

38. Pictorial illustrations of a "sanitary landfill" and a "dump" appear on the sheet facing this page.

Open Dumping

"The land disposal site employing an *engineered method of disposal* of solid waste *in a manner that minimizes environmental hazards,* including, but not limited to the spreading of the solid waste in thin layers, compacting the waste to the smallest practical volume, and applying cover material on a daily or more frequent basis."

N. J. A. C. 7:26-1.4.54 (Emphasis added)

A dump, on the other hand, is separately defined as:

"A land site at which solid waste is disposed of in a manner which does not protect the environment, is susceptible to open burning, or is exposed to the elements, vectors, and scavengers."

N. J. A. C. 7:26-1.4.23.

When dumps were determined to be hazardous to human health, their operation was entirely prohibited in the State of New Jersey, *N. J. A. C.* 7:26-2.1.1. No distinction was made between dumps which accepted for disposal solid waste collected within New Jersey and those which accepted waste collected outside the State. The regulation acted in a non-discriminatory, even-handed manner in addressing a legitimate public problem. It was the method of disposal which posed a substantial threat to public health and environmental quality, *not* the substances disposed of or the place of their origin.

Environmental hazards are minimized by the sanitary landfill disposal method, and by incineration, due to the emphasis placed upon design and sanitary operation. Origin of wastes is not related to these criteria. The de-

gree to which a disposal mode presents a threat to public health and environmental quality is entirely within the regulatory control of the State.

The legitimate local interests of the State have already been protected, without exclusion, by the adoption of state administrative regulations applicable alike to intrastate commerce and interstate commerce.

3. Effect Upon Interstate Commerce.

The direct burden imposed upon interstate commerce by the adoption of *P. L.* 1973, *c.* 363 is obvious and severe. Prohibitory legislation affects interstate commerce in a most basic and fundamental sense. As stated by Mr. Justice McKenna in *Oklahoma v. Kansas Nat. Gas Co.*, 221 *U. S., supra,* at 249, ". . . to prohibit interstate commerce is more than to indirectly affect it."

P. L. 1973, *c.* 363 directly prohibits the interstate disposal of solid and liquid waste. It is not unique in that respect. Since 1969, seven states have adopted laws which, to varying degrees, prohibit the disposal of solid waste collected in another state.[39] Three other states have imposed various regulatory limitations.[40] The effect of these enactments is to retard, if not to entirely obviate, the national goal of achieving interstate cooperation in confronting the solid waste disposal problem (A57, 58).

More than ten years ago, Congress identified solid waste disposal as a problem of national concern. In 1965

39. Maine, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Vermont.

On December 30, 1974, the Commonwealth of Pennsylvania enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. This legislation was surely prompted by, and retaliatorily directed against, the prohibitory legislation adopted in New Jersey.

40. Delaware, Illinois and Louisiana.

it enacted the Solid Waste Disposal Act, *Pub. L.* 89-272, for the purpose of promoting "a national research and development program for new and improved methods of proper and economic solid waste disposal", 42 *U. S. C.* § 3251(b)(1), and providing financial resources to accomplish same. Five years later, the Resource Recovery Act of 1970, *Pub. L.* 91-512 was adopted to underscore the importance of resource recovery. In both cases, the Secretary of Health, Education and Welfare (now the Administrator of the Environmental Protection Agency) was directed to ". . . encourage cooperative activities by the States . . . encourage, where practicable, interstate, interlocal, and regional planning . . .; and encourage the enactment of improved and, so far as practicable, uniform state and local laws governing solid waste disposal". 42 *U. S. C.* § 3254.

Prohibitory and retaliatory legislation is clearly alien to the expressed congressional intent. It creates a climate attuned to inhibit rather than to promote the national interest; and it will lead to an escalation in the cost of solid waste collection and disposal, which is already significant.

An estimated $3 billion was spent annually for solid waste collection and disposal at the time of the adoption of the Solid Waste Disposal Act, 42 *U. S. C.* § 3251 *et seq.*, 1965 *U. S. Code, Cong. and Adm. News,* p. 3614. The cost of said service reached an estimated $4.5 billion by 1970, 1970 *U. S. Code, Cong. and Adm. News,* p. 4553. The House Report noted:

> "The greatest amount of the moneys spent goes for *collecting* solid waste and *transporting* it to some place where it may be dumped or burned."
>
> 1970 *U. S. Code, Cong. and Adm. News,* p. 4553.

An identical conclusion was reached independently by the Bureau of Solid Waste Management (A75) which noted: ". . . The collection and haulage of our solid waste accounts for 75 to 85 percent of the total collection/disposal costs. . . ."

Although the New Jersey Supreme Court held that *P. L.* 1973, *c.* 363 did not discriminate against interstate commerce in an economic sense, it recognized the obvious economic impact of its decision upon interstate commerce:

> "The City of Yonkers has access to the Croton dump in New York at a modest increase in cost of five dollars per ton. Philadelphia's stated alternatives are either to install adequate air pollution devices in their existing incinerators or to establish new landfill sites outside the city, which would require the purchase of additional disposal trucks."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra,* at 476.

The New Jersey Department of Environmental Protection estimates that 1.5 million tons of solid waste originating outside of the State was buried in New Jersey in 1971. *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra,* at 461. If the cost of disposing of solid waste is increased at the same "modest" rate of five dollars per ton postulated for the City of Yonkers, then yearly disposal costs for out-of-state waste would increase by a staggering $7.5 million. Furthermore, Appellant City of Philadelphia has averred that the cost of incineration facilities complying with federal and state air pollution standards would cost approximately $100,000,000 (A264). These costs are hardly insignificant.

But that is not all. Economic harm will likely be suffered by New Jersey in its efforts to dispose of the solid

waste collected within its borders. Since a direct relationship exists, in land disposal of solid waste, between cost and distance to disposal site, communities located in northern New Jersey will no doubt look to southern New York and eastern Pennsylvania, rather than to southern New Jersey, when existing landfill sites situated in the northern part of the state are consumed in an estimated 3 years. *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra,* at 461. These communities will be immediately foreclosed from seeking disposal alternatives in Pennsylvania, either now or in the future, because retaliatory legislation has been adopted by that Commonwealth, 35 P. S. § 6007. Furthermore, the prohibition against interstate treatment and disposal of solid waste will inevitably lead to the diminishment and termination of sanitary landfill business in New Jersey (A44, 254, 271, 281), with attendant increase of disposal costs to persons presently relying upon said sites.

According to estimates prepared by the New Jersey Department of Environmental Protection, the exclusion of out-of-state solid waste would increase the anticipated *existing* landfill life in New Jersey by a mere 8%. This potential loss, which is already inconsiderable, is of no special concern in light of available sites which may hereafter be developed for sanitary landfill purposes. In an affidavit submitted to the trial court, it was unequivocally stated by two New Jersey licensed professional engineers (A61) that there is no scarcity of land in the State which could be used for solid waste disposal:

> "There is unlimited suitable available acreage in the State of New Jersey for sanitary landfill purposes which could be developed in accordance with existing and proposed regulations of the New Jersey Department of Environmental Protection."

No affidavit has been filed to refute the truth or accuracy of that assertion, although many opportunities have been presented to do so.

Engineering designs for sites capable of handling millions of tons of solid waste have already been filed with the New Jersey Department of Environmental Protection or are presently being developed (A275-289). This is simply a reflection of the immutable principle that private industry responds to consumer demand.

Ironically, as of March 13, 1974, the New Jersey Department of Environmental Protection made no effort to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey (A112), or to determine the location and availability of facilities which presently exist or may hereafter be developed outside the State of New Jersey (A115). It is distressing indeed that the method adopted by the State to provide for the disposal of its own solid waste is to prohibit the disposal, in *privately owned and operated* sanitary landfills, of waste collected or originating outside the State.

Tonnage figures associated with solid waste disposal appear at first glance and without explanatory remarks, to be overwhelming. They are, in reality, of no special significance. A sanitary landfill site consisting of 200 acres, filled to a depth of 50 feet, and operated in compliance with the regulations of the New Jersey Department of Environmental Protection, would remain fully operational to dispose of 10,000 tons of solid waste per week for a period of approximately 12.4 (111) to 15 years (A61, 275).

Assuming for the sake of argument, that approximately 10,000 tons of solid waste per week are being brought into New Jersey from the City of Philadelphia and disposed of in this State (A70), it would take at least 12.4 years to fill a single 200 acre site! And such site could thereafter be

used for industrial, commercial, recreational, or green acres purposes (A276-277).

In wording and in practical effect, *P. L.* 1973, *c.* 363 imposes a direct and intolerable burden upon interstate commerce.

C.

Appellants Were Unconstitutionally Denied a Plenary Hearing on the Merits of Their Claim.

In granting Appellants' motion for summary judgment on March 25, 1974, the New Jersey Superior Court, Law Division, declared *P. L.* 1973, *c.* 363 unconstitutional as a matter of law on the ground that same discriminates against interstate commerce.

The statements made by Mr. Justice Brennan, when he sat upon the New Jersey Supreme Court, in *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N. J.* 57, 74 (1954), continue to represent the definitive expression of the standards of decision governing the grant or denial of a summary judgment motion:

> "It is designed to provide a prompt business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> • • •
>
> The standards of decision governing the grant or denial of a summary judgment emphasize that *a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.* At the same time, the standards are to be applied with discriminat-

> ing care so as not to defeat a summary judgment if the movant is justly entitled to one." (Emphasis added)

Appellants motion for summary judgment was based only upon those Commerce Clause issues which did not involve questions of material fact. They acknowledged the existence of other issues upon which summary judgment could not be granted (A120).

The trial judge's opinion reveals his determination as a matter of federal constitutional law, (a) that the transportation of solid or liquid waste across state lines is a legitimate subject of interstate commerce, and (b) that *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce. Had the trial court not reached those conclusions, appellants' motion for summary judgment would have been denied, and the plenary hearing scheduled for April 15, 1974, would have been conducted.

By their notice of appeal (A216) Appellees appealed to the Superior Court of New Jersey, Appellate Division:

> ". . . from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring *P. L.* 1973, *c.* 363 unconstitutional as violative of Art. 1, Section 8, Clause 3 of the Constitution of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc."

Said notice of appeal also contained a certification that a plenary hearing had never been held before the trial court:

> "I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment."

Appellees did *not* appeal from the denial of their cross-motion for partial summary judgment. If they did, and leave to file an interlocutory appeal was granted by the Superior Court, Appellate Division, the only relief to which Appellees would have been entitled was a partial summary judgment and a remand for a hearing of the numerous remaining issues of material fact.

Although the New Jersey Supreme Court agreed that the transportation and disposal of solid waste represented a legitimate subject of interstate commerce, it did not agree that *P. L.* 1973, *c.* 363 discriminated against interstate commerce. However, instead of reversing the decision of the trial court and remanding the matter for a hearing on the material factual issues presented by the complaint, it disposed of the entire matter by upholding the constitutionality of the statute. Appellants were thereby entirely deprived of an opportunity to present evidence on the reasonableness of the exercise of the State's police power and the extent of the burden upon interstate commerce. They were also deprived of their right to present evidence with respect to the numerous non-Commerce Clause issues raised by their complaint.

This result was incomprehensible. Appellees had never urged that they were entitled to judgment, as a matter of law, on the merits of the entire action. Quite to the contrary, they specifically argued to the trial court that there were numerous unresolved questions of material fact (A121-122):

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any

of the relevant facts and circumstances except affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints*.

• • •

Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Appellants petitioned the New Jersey Supreme Court to reconsider their decision. They pointed out that a plenary hearing had never been held on any issue raised by the complaint, including the reasonableness of the exercise of the State's police power and the extent of its burden upon interstate commerce, and that *P. L.* 1973, *c.* 363 was not being attacked on Commerce Clause grounds alone.[41]

After considering appellants' arguments, the New Jersey Supreme Court remanded the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate. . . ." (A340). No guidance was given to the trial court as to what proceedings, if any, might be "deemed appropriate" by the New Jersey Supreme Court in light of its decision, on the merits, that

41. Separate counts in the complaint challenged *P. L.* 1973, *c.* 363 on due process, equal protection of the laws and impairment of the obligation of contract grounds, among others.

P. L. 1973, *c.* 363 represented a reasonable exercise of the State's police power and did not unreasonably burden interstate commerce. Said decision was neither altered nor amended in connection with the remand. In addition, the Court refused to retain jurisdiction and specifically prohibited the trial court from granting any interim injunctive relief. After effectively depriving appellants of their day in court on the merits of their complaint, the Court also foreclosed appellants from pursuing procedural remedies in the trial court.

The net effect of these rulings was not only to place appellants in a substantially worse position than they would have been in had their motion for summary judgment initially been denied by the trial court, but also to deprive them of a most basic and fundamental right: appellants were never afforded an opportunity to be heard prior to a final determination by the New Jersey Supreme Court that *P. L.* 1973, *c.* 363 (a) represented a reasonable exercise of the State's police power, and (b) did not unreasonably burden interstate commerce. In addition, they were foreclosed from obtaining injunctive relief pending a resolution of ". . . such further proceedings, if any, that . . . [the trial] Court may deem appropriate . . . ."

As a practical consequence of this action,[42] appellants were constrained to dismiss, with prejudice, each and every count in their complaint which had not been directly addressed by the New Jersey Supreme Court, so that a direct appeal could be taken to this Court.

Appellants respectfully contend that they have been denied due process of law by the New Jersey Supreme

42. In the event the *status quo* was not maintained, but rather altered by the revocation of the interlocutory injunction issued by the trial court, appellants would have suffered immediate and irreparable harm. This appears to be consistent with the conclusion reached by Mr. Justice Brennan, who stayed the mandate of the New Jersey Supreme Court.

Court, in violation of the 5th and 14th amendments to the Constitution of the United States, and in contravention of the decisions of this Court.

The principle of federal constitutional law applicable to the case at bar has been reiterated time and time again by the United States Supreme Court:

> "The fundamental requisite of due process of law is the opportunity to be heard."
>
> *Grannis v. Ordean,* 234 *U. S.* 385, 394 (1914); *Mullane v. Central Hanover Tr. Co.,* 339 *U. S.* 306 (1950).

An opportunity to be heard includes an opportunity to present a case and to be heard in its support. *Brinkerhoff-Faris Co. v. Hill,* 281 *U. S.* 673, 681 (1930). Although appellants scrupulously followed the procedural rules inhering in the courts in the State of New Jersey, they were entirely deprived of an opportunity to be heard at a meaningful time and in a meaningful manner in order to defend their substantive right. They had no opportunity to be heard on the merits of any issue of material fact raised by their complaint prior to the final determination. *Rhodes v. Houston,* 202 *F. Supp.* 624 (Neb. 1962), aff'd 309 F. 2d 959 (8th Cir. 1962), *cert. den.* 372 *U. S.* 909 (1963), 383 *U. S.* 971 (1966).

The denial of this fundamental right was raised to the New Jersey Supreme Court at a conference meeting in the presence of appellees on November 18, 1975, the very same day that the case *sub judice* was decided. Accordingly, the additional federal claim presented by the within due process argument was raised by appellants at their very first opportunity. *Brinkerhoff-Faris Co. v. Hill,* 281 *U. S., supra,* at 678. It was asserted a second time less than two weeks later in a motion addressed to the New

Jersey Supreme Court which resulted in the aforesaid order remanding the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate . . . ."

Upon appellants' consent to dismiss all counts of its complaint *except* Counts I, VII and XIX, no further proceedings were deemed appropriate by the trial court, (A343),

> ". . . in light of . . . the decision by the New Jersey Supreme Court upholding the constitutionality of P. L. 1973, c. 363 as representing a valid exercise of the State's police power which does not reasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint . . . ."

The action taken by the New Jersey Supreme Court in upholding the constitutionality of *P. L.* 1973, *c.* 363 without affording appellants an opportunity to be heard on the merits violates due process of the law. Fundamental rights cannot so lightly be discarded.

CONCLUSION.

The New Jersey Supreme Court has decided an issue of national importance in a way not in accord with the decisions of this Court, and in conflict with decisions of other state and federal courts which have recently decided cases involving environmental questions. It has also so far departed from the accepted and usual course of judicial proceedings as to violate appellants' right to due process of the law in violation of the 5th and 14th amendments to the Constitution of the United States.

It is respectfully urged, in order of preference, and in the alternative, (1) That the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional on the ground that same directly burdens and discriminates against interstate commerce; or (2) that the judgment of the New Jersey Supreme Court be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

We hereby certify that on this 3rd day of June, 1976, three copies of the Brief of Appellants and the Single Appendix were mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey 08625; and to William C. Brashares and Paul M. Laurenza, Cladouhos & Brashares, attorneys for *amicus curiae,* National Solid Wastes Management Association, at their law office located at 1750 New York Avenue, N.W., Washington, D. C. 20006.

We further certify that all parties required to be served have been served.

By .....
HERBERT F. MOORE

By .....
ARTHUR MEISEL